KUALA REMAN ESTATES BHD. & ANOR.

v.

FABER MERLIN MALAYSIA BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D4-22-860-1989]
29 JUNE 1989

CIVIL PROCEDURE: *Injunction - Plaintiffs seeking injunction to restrain the defendant from taking possession of hotel whereas the defendant was seeking injunction to restrain the plaintiffs from entering or remaining in hotel - Dispute relating to three inter-related agreements - Whether serious questions to be tried - Balance of convenience - Whether this was an exceptional and extremely rare case to grant mandatory injunction.*

The first plaintiff ("Reman Estate") was the present shareholder of Hotel Merlin Kuala Lumpur Sdn. Bhd. ("Hotel Merlin"), the second plaintiff who was the present operator of the hotel. Before 1 March 1988, the defendant ("Faber Merlin") was the holding company of Hotel Merlin which was wholly owned subsidiary of Faber Merlin.

On 1 March 1988 a sale and purchase agreement was entered into between Faber Merlin and Reman Estates. Under this agreement, Reman Estates agreed to purchase from Faber Merlin all the 750,000 shares in Hotel Merlin for a consideration of RM2. Under the agreement Faber Merlin undertook to pay and settle the employees of Hotel Merlin for the months prior to 1 March 1981. Under Clause 4(b) of the agreement, Reman Estate agreed and undertook to cause Hotel Merlin to execute simultaneously with this agreement (i) a tenancy agreement whereby Faber Merlin would take the hotel building and equipment more fully described in the tenancy agreement and (ii) the agreement for the sale of assets and assumption of liabilities.

The agreement for the sale of assets and assumption of liabilities was entered into between Hotel Merlin and Faber Merlin on 1 March 1988. According to the preamble of the agreement Faber Merlin wished to acquire all the assets of Hotel Merlin in exchange for the assumption by Faber Merlin of all of Hotel Merlin's liabilities and obligations. Faber Merlin would also release and discharge Hotel Merlin of all inter-company loans lent to the hotel by Faber Merlin.

The tenancy agreement was entered into between Faber Merlin and Hotel Merlin on 1 March 1988. Under this agreement the hotel and its equipment were leased by Faber Merlin to Hotel Merlin for a period of three years and Hotel Merlin would pay to Faber Merlin a monthly rental of RM240,000 throughout the three years period except that for the first three months commencing 1 March 1988 no rent would be payable and for the period commencing from 1 June 1988 to 28 February 1989, the monthly rental would be RM320,000. Article 4 provided that Hotel Merlin would duly and punctually pay to Faber Merlin the monthly rents. Article 8(e) provided that in the event of default by Hotel Merlin, Faber Merlin would terminate the agreement and take possession of the hotel.

On 27 January 1989 Faber Merlin's solicitors issued a notice of demand to Hotel Merlin demanding arrears of rents due and owing under the tenancy agreement in the sum of RM1,773,562.22. On 7 March 1989, Faber Merlin's solicitors issued a second notice to Hotel Merlin demanding arrears of rent due and owing amounting to RM1,940,542.55 less the sum of RM436,652.56 being municipal taxes, assessments and rates. Hotel Merlin refused to pay

and on 20 April 1989 Reman Estate and Hotel Merlin filed a summons and statement of claims against Faber Merlin. Faber Merlin entered an appearance and filed its statement of defence and counter claim on 24 May 1989. The plaintiffs filed their reply and defence to the counter claim on 1 June 1989. On 15 June 1989 Faber Merlin took possession of Hotel Merlin.

On 20 June 1989 the present two applications were for hearing before the Court. In the first application filed by the plaintiffs, the plaintiffs sought the order of the Court to grant an injunction restraining the defendant whether by itself, its agents or servants from taking possession control and or management of the Kuala Lumpur Merlin Hotel and costs. In the second application filed by the defendant, the defendant asked the Court to order that the first and second plaintiffs forthwith vacate the defendant's land and premises namely the Kuala Lumpur Merlin Hotel and to grant an injunction restraining the first and second plaintiffs from entering or remaining on the said hotel, and/or from obstructing or interfering the management and using of the said hotel by the defendant, its servants or agents. The defendant's application was for a mandatory injunction.

The plaintiffs argued that the intention and effect of all the agreements was that the defendant divest itself of the second plaintiff with the second plaintiff retaining a liability of RM3.73 million. The plaintiff also alleged that the defendant was in breach of the agreements by failing to disclose its liabilities and had intentionally and unreasonably chosen not to carry out its obligations as contained in the agreements as a result of which the plaintiffs incurred expenses. The plaintiffs also averred that Hotel Merlin, after having paid RM867,000 refused to make further payments under the tenancy agreement and exercised the right to set-off against all monies owing by Faber Merlin and against all monies paid and to be paid on behalf of Faber Merlin.

Faber Merlin in its defence and counterclaim for arrears of rents had asked the Court to order delivery of vacant possession of the hotel to Faber Merlin. The question that arose was whether or not Faber Merlin can rely solely on the tenancy agreement and take advantage of it even though the three agreements were so inter-related to one another. The defendants contended that the lease was terminated according to the tenancy agreement and Hotel Merlin was therefore a trespasser on the premises. Accordingly the basis of mandatory injunction flowed from the fact that the first plaintiff was a trespasser.

Held:

[1] There are serious questions to be tried in the present case. Hotel Merlin would suffer irreparable damage which could not be compensated if the injunction prayed for by the plaintiffs was not granted. It is not in dispute that Hotel Merlin had the expertise to operate a first class five star hotel. On the other hand there is no evidence that Faber Merlin has the expertise to operate a first class hotel like Hotel Merlin. It is clear therefore that the balance of convenience lies in favour of granting the injunction.

[2] The defendant's application was for a mandatory injunction. It is true that Faber Merlin was entitled to take possession of the hotel under the tenancy agreement. But the Court has to consider Faber Merlin's obligations under the two other agreements as well. There were allegations that Faber Merlin had acted in breach of the other two agreements. There is no evidence that Faber Merlin has the expertise to run five star hotel while Hotel Merlin has acquired the reputation and goodwill to operate the hotel as a five star hotel of international standard. In the circumstances this was not an exceptional and extremely rare case for the Court to grant a mandatory injunction. Furthermore the balance of convenience was not in favour of granting the injunction.

[Order in terms of the plaintiff's application subject to usual undertaking as to damages. Defendant's application dismissed with costs.]

Cases referred to:

British Anzani (Felixstone Ltd. v. International Marine Management (UK) Ltd. [1979] 2 All ER 1063
Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd. [1985] CLJ (Rep) 242
Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte. Ltd. [1984] 1 CLJ (Rep) 346
American Cyanamid v. Ethicon [1975] AC 396
Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd. [1979] MLJ 150
Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd. [1985] CLJ (Rep) 231
Bank Islam Malaysia Bhd. v. Tinta Press Sdn. Bhd. & Ors. [1986] 1 MLJ 259
Tinta Press Sdn. Bhd. v. Bank Islam Malaysia Bhd. [1987] CLJ (Rep) 396

For the plaintiffs - Dennis Xavier; M/s. Dennis Xavier & Chandran
For the defendants - Mohamed Ismail bin Mohd. Shariff; M/s. Mohd. Ismail & Co.

JUDGMENT

Zakaria Yatim J:

On 20 June 1989 there were two applications for hearing before this Court. The first application was filed by the plaintiffs. In that application the plaintiffs sought the order of the Court to grant an injunction restraining the defendant whether by itself, its agents, or servants from taking possession, control and or management of the Kuala Lumpur Merlin Hotel and costs. The second application was filed by the defendant. In that application the defendant asked the Court to order that the first and second plaintiffs forthwith vacate the defendant's land and premises namely the Kuala Lumpur Merlin Hotel and to grant an injunction restraining the first and second plaintiffs from entering or remaining on the said hotel, and/or from obstructing or interfering with the management, and using of the said hotel by the defendant, its servants or agents. The defendant's application was for a mandatory injunction.

After hearing the arguments of both Counsel for the plaintiffs and for the defendant, I made an order in terms of the plaintiff's application subject to the usual undertaking as to damages. The defendant's application was dismissed with costs. I stated that I would give my reasons later. I do so now.

The first plaintiff (hereinafter referred to as "Reman Estates") is a public limited company incorporated under the laws of Malaysia having its registered office at Suite 9.03, 9th Floor, Wisma KLI, 126, Jalan Bukit Bintang, Kuala Lumpur. It is the present shareholder of Hotel Merlin Kuala Lumpur Sdn. Bhd. (hereinafter referred to as "Hotel Merlin"), the second plaintiff. The second plaintiff is the present operator of the hotel. The defendant is a public limited company incorporated under the laws of Malaysia having its registered office at the 5th Floor, Wisma Merlin, Jalan Sultan Ismail, Kuala Lumpur. (Hereinafter referred to as "Faber Merlin"). Before 1 March 1988 Faber Merlin was a holding company of Hotel Merlin which was a wholly owned subsidiary of Faber Merlin.

On 1 March 1988 a sale and purchase agreement was entered into between Faber Merlin and Reman Estates. Under this agreement, Reman Estates agreed to purchase from Faber Merlin all the 750,000 shares in Hotel Merlin for a consideration of RM2. Faber Merlin was the registered and beneficial owner of all the said shares. The agreement provided that the effective time and date of the transfer of ownership of Hotel Merlin would be at 12.01 a.m. on 1 March 1988. Under the agreement Faber Merlin undertook to pay and settle the Employees Provident Fund of all employees of Hotel Merlin for the months prior to 1 March 1988. Under Clause 4(b) of the agreement, Reman Estates agreed and undertook to cause

Hotel Merlin to execute simultaneously with this agreement (i) a tenancy agreement whereby Faber Merlin would let and Hotel Merlin would take the hotel building and equipment more fully described in the tenancy agreement and (ii) the agreement for the sale of assets and assumption of liabilities.

The agreement for the sale of assets and assumption of liabilities was entered into between Hotel Merlin and Faber Merlin on 1 March 1988. According to the preamble of the agreement Faber Merlin wished to acquire all the assets of Hotel Merlin in exchange for the assumption by Faber Merlin of all of Hotel Merlin's liabilities and obligations. Faber Merlin would also release and discharge Hotel Merlin of all inter-company loans lent to the hotel by Faber Merlin. Under Clause 1 of the agreement, Hotel Merlin agreed to sell, convey, transfer and deliver to Faber Merlin all the assets and properties of Hotel Merlin as enumerated and specified in Schedule 1. Schedule 1, however, was left blank when the agreement was signed, Clause 2 provided that in consideration for the sale, conveyance, transfer and delivery as stipulated in Clause 1, Faber Merlin assumed and agreed to pay, perform and discharge all obligations and liabilities of Hotel Merlin as enumerated and specified in Schedule 2, provided that Faber Merlin would have no liability with respect to any debts or liabilities of any kind, character or discipline, whether accrued, absolute, stringent or otherwise as to which no provision or reference was made in Schedule 2. Schedule 2 merely contained the names of five creditors and the amount outstanding as at 29 February 1988 was left blank. Under Clause 2, Faber Merlin also agreed to release and forever to discharge Hotel Merlin of inter-company loans enumerated and specified in Schedule 3. Schedule 3 was also left blank.

The tenancy agreement was entered into between Faber Merlin and Hotel Merlin on 1 March 1988. Under this agreement the Hotel and its equipment were leased by Faber Merlin to Hotel Merlin for a period of three years for the purpose that Hotel Merlin would operate the Hotel as a first class international standard five star deluxe hotel. Hotel Merlin would have absolute control and discretion in the operation of the hotel. Under Art. 3 of the agreement, Hotel Merlin would pay to Faber Merlin a monthly rent of RM240,000 throughout the three year period except that for the first three months commencing 1 March 1988 no rent would be payable and for the period commencing from 1 June 1988 to 28 February 1989 the, monthly rent would be RM320,000 Art. 4 provided that Hotel Merlin would duly and punctually pay to Faber Merlin the monthly rents. Article 8(e) provided that in the event of default by Hotel Merlin, Faber Merlin would terminate the agreement and take possession of the Hotel.

On 27 January 1989, Faber Merlin's solicitors issued a notice of demand to Hotel Merlin demanding arrears of rents due and owing under the tenancy agreement in the sum of RM1,773,562.22. On 7 March 1989, Faber Merlin's solicitors issued a second notice to Hotel Merlin demanding arrears of rent due and owing amounting to RM1,940,542.85 less the sum of RM436,652.56 being municipal taxes, assessments and rates. Hotel Merlin refused to pay the sums demanded by Faber Merlin and on 20 April 1989 Reman Estates and Hotel Merlin filed a writ of summons and statement of claim against Faber Merlin. Faber Merlin entered appearance and filed its statement of defence and counterclaim on 24 May 1989. The plaintiffs filed their reply and defence to the counterclaim on 1 June 1989. On 15 June 1989 Faber Merlin took possession of Hotel Merlin. In the affidavit of Johari bin Ahmad affirmed on 15 June 1989 in support of the plaintiffs' application, it was alleged that Faber Merlin by its agent or servant, Mr. Gan Tong Kua, the Group Financial Controller, and one Raja Mohar, the manager (Human Resources) together with about fifty persons forcibly took possession of the Hotel at about 4.30 a.m. on 15 June.

Mr. Dennis Xavier, Counsel for the plaintiffs, in his submission told the Court that it was the plaintiffs' contention and the basis of the plaintiffs' claim that the intention of the parties was that the plaintiffs, after the transfer of assets and liabilities was only to retain a net liability of RM3.73 million. The consideration of RM2 was not a real consideration for the transfer of shares. According to him, the real consideration was the assumption of liabilities by Hotel Merlin for RM3.73 million after the assets were transferred. Mr. Xavier appeared to have arrived at the figure of RM3.73 million on the basis of a newspaper report in the Star dated 7 April 1988 which was exhibited to the affidavit of Johari bin Ahmad. The newspaper report states, *inter alia*:

> The sale of Hotel Merlin Kuala Lumpur Sdn. Bhd. will not be subject to any approval as it is not substantial and does not fall within the ambit of s. 132(c) of the Companies (Amendment) Act 1965 nor the guidelines of the KL Stock Exchange.
>
> This was stated by Faber Merlin Malaysia Bhd., former owner of the hotel, in a statement in reply to queries from the KLSE over the sale.
>
> **It added that the consideration of RM2 was arrived at after taking into account the net liability of RM3.73 million which Kuala Reman Estates has to absorb ...**
>
> (Emphasis added).

In para. 4 of the statement of claim the plaintiffs averred that "the intention and effect of all the agreements was that the defendant divests itself of the second plaintiff with the second plaintiff retaining a liability of Malaysian Ringgit 3.73 million" Faber Merlin in its statement of defence and counterclaim, denied para. 4 of the statement of claim. This is clearly a serious question to be tried.

It will be noted that the first, second and third schedules to the agreement for the sale of assets and assumption of liabilities were left blank when the agreement came into force on 1 March 1988. In a letter written by Faber Merlin dated 17 September 1988 and addressed to Hotel Merlin, Faber Merlin wrote, "In accordance with agreement for the sale of assets and assumption of liabilities, we furnish herewith Schedule 1 to 3 for your reference." In Schedule 1 the total assets was RM13,131,162.11. In Schedule 2, the amount outstanding to the five creditors as at 29 February 1988 was RM9,411,715.15. In Schedule 3 the amount of loan advanced to Hotel Merlin as at 29 February 1988 was RM3,897,899.69. According to para. 7(ii) and (iii) of the statement of claim, the parties to the agreement agreed that since it was not feasible to obtain the latest figures for the obligation and liabilities and for the inter-company loans advanced to Hotel Merlin by 1 March 1988, Faber Merlin would supply the figures in Schedules 2 and 3 within one month from the date of the agreement. Clause 5(g) and (h) of the agreement provided:

(g) Notwithstanding anything contained herein the parties hereto agree that the buyer shall only assume the obligations and liabilities owing to the creditors named in Schedule 2 hereto as at 29 February 1988. The parties further agree that as it is not feasible to obtain the latest figures for the obligation and liabilities as at the date hereof when the parties execute this agreement, the buyer **shall supply the figures in Schedule 2 within one (1) month from the date hereof and** the figures so supplied **shall be conclusive and binding upon the parties hereto**.

(h) Notwithstanding anything contained herein the parties hereto agree that it is not feasible to obtain the latest figures for the inter-company loans advanced to the seller as at the date hereof when the parties execute this agreement, the buyer **shall supply the figures in Schedule 3 within one (1) month** from the date hereof and the figures so supplied **shall be conclusive and binding upon the parties**, hereto.

(Emphasis added).

The figures were in fact supplied by Faber Merlin six and a half months after the signing of the agreement. Faber Merlin, in its statement of defence admitted para. 7 of the statement of claim. The question that arises is whether the Schedules given six and a half months after the date of the agreement were binding on Hotel Merlin. This is another serious question to be tried.

The plaintiffs alleged that the unsecured liabilities of Hotel Merlin as on 29 February 1988 was in the region of RM12,281,658.90 and not RM3.73 million. The plaintiff further alleged, that in addition, there were secured debts amounting to RM13,312,614.84 and RM16 million. Mr. Xavier submitted that the plaintiffs agreed to assume liability in the sum of RM3.73 million and nothing more. It was on that basis that Hotel Merlin was to pay rent of RM240,000 a month for three years. In para. 8 of the statement of claim, the plaintiffs further alleged that Faber Merlin, in breach of the agreements dated 1 March 1988, failed to disclose to Reman Estates:

(i) that the shoe allowances, annual increments, overtime payments, bonuses and employees provident fund contributions for the years 1986 and 1987 for employees employed by Hotel Merlin amounting to RM732,665.24 had not been paid;

(ii) that service charges collected by Hotel Merlin in the month of February 1988 and amounting to RM94,972.31 had not been paid to the employees employed by Hotel Merlin;

(iii) that the provision for retirement benefits as of 29 February 1988 for employees employed by Hotel Merlin stood at RM2,463,718.66.

(iv) that a sum of RM235,966.36 deducted from the February 1988 wages of the employees employed by Hotel Merlin were not remitted to the various bodies on whose behalf such deductions were made;

(v) that a company Simetech (M) Sdn. Bhd. had by a Court order dated 12 December 1987 obtained judgment when Hotel Merlin was to pay the said company RM135,480.80;

(vi) that as at 1 March 1988, Faber Merlin owned the relevant authorities RM989,435.10 and a penalty of RM29,205.20 in municipal tax, assessments and licence fees and all other rates, taxes imposition duties penalties and other outgoings levied charged or assessed or in respect of Hotel Merlin prior to 1 March 1988.

The plaintiffs further alleged that Faber Merlin failed to supply the complete figures in Schedules 2 and 3 of the assets and liabilities agreement.

Faber Merlin in its statement of defence denied all the allegations made in para. 8 of the statement of claim. These allegations, which were disputed by Faber Merlin raised serious questions to be tried.

In para. 9 of the statement of claim the plaintiffs averred that Faber Merlin had intentionally and unreasonably chosen not to carry out its obligations as contained in the agreements as a result of which the plaintiffs had expended on behalf of Hotel Merlin the following sums:

1. Of improvements made to hotel	257,366.50
2. Part payments towards employees' shoe allowance, annual increment, overtime payment, bonus and Employees Provident Fund Contributions for 1986 and 1987	155,504.91
3. Payment of service charge	94,972.31
4. Payment of service tax	48,624.71
5. Payment towards settlement of accounts accrued to defendant	559,582.49
6. Payment towards unsecured creditors	277,572.47

The plaintiffs further averred that Faber Merlin as at 31 January 1989 was indebted to Hotel Merlin in the sum of RM413,195.19 being utility charges for goods supplied and services rendered between 9 March 1988 and 31 January 1989. In para. 12 of the statement of claim the plaintiffs averred that Hotel Merlin, after having paid RM867,000 refused to make further payments under the tenancy agreement and exercised the right to set-off against all monies owing by Faber Merlin and against all monies paid and to be paid on behalf of Faber Merlin.

Mr. Xavier submitted that the plaintiffs were entitled to a set-off. In support of his submission he cited *British Anzani (Felixstone Ltd. v. International Marine Management (UK) Ltd.* [1979] 2 All ER 1063. In that case the parties signed two agreements for the lease of two warehouses to the defendants for twenty-one years. The plaintiffs commenced an action against the defendants. The defendants alleged that serious defects had appeared in the floors of both the warehouses making them unusable and claimed damages for more than 1 million Pounds from the plaintiffs. They also refused to pay any further rent. The plaintiffs subsequently issued a writ claiming possession and unpaid rent and mesne profits amounting to over 570,000 Pounds. The defendants admitted owing some 540,000 Pounds but claimed that the amount owing was subject to a set-off in respect of their counterclaim. The Court held that since the defendants' counterclaim arose out of alleged breaches of the agreement which had rendered the warehouses unfit in part for the purpose for which they were leased, and because it would be manifestly unjust to allow the plaintiffs to recover rent without taking into account damages caused by the plaintiffs' failure to perform their part of the agreement, the defendants had established a sufficiently close connection between the transactions for them to raise their claim as a set-off against the plaintiffs' claim.

In *Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd.* [1985] CLJ (Rep) 242, the Federal Court defined a set-off as follows:

> A set-off is a cross-claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. A cross-claim is not necessarily a set-off, merely because the word used in the pleading is 'set-off'. Whether or not the plea is a set-off has to be determined as a matter of law and substance. *Hanak v. Green.* A cross-claim which is accepted as a defence of set-off has the effect of extinguishing either the whole or part of the plaintiff's claim. See *In re A Bankruptcy Notice*. But to constitute a set-off the sum of money meant as a cross-claim must from its nature and quality be such that it is proper to be dealt with as a defence to the plaintiff's claim and not as a separate cause of matter.

The Federal Court went on to state at p. 247 of its judgment the characteristics of set-off:

> The characteristics of set-off as contained in O. 18 r. 17 are that (1) it is a cross-claim for a sum of money, ascertained or otherwise; (2) it is relied as a defence to meet the whole or part of the plaintiff's claim, and (3) that it is immaterial whether it is added or not as a counterclaim as long as it is included in the defence. Thus, if a cross-claim relied on by the defendant as a set-off does not and cannot absolve the plaintiff's claim because it arises from a separate transaction, we agree that the cross-claim is not necessarily a set-off, though it is so described, and that such cross-claim could, because of its nature and quality, only amount to a counter-claim. (See Lord Denning, MR in *Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc.*

From the passage just quoted it appears that a plea of set-off is relied upon as a defence to meet the whole or part of the plaintiffs' claim. In the *British Anzani* case and *Permodalan Plantations* case it was the defendant who pleaded a defence of set-off. In the present case it is the plaintiff's who pleaded a set-off in the statement of claim. However from the evidence the plaintiff's claim is so closely connected with Faber Merlin's claim for arrears of rent under the tenancy agreement. In my view whether or not the plaintiffs are entitled to a set-off, is a serious question to be tried.

Faber Merlin in its defence and counterclaim claimed for arrears of rents and asked the Court to order delivery of vacant possession of the hotel to Faber Merlin. The question that arises here is whether or not Faber Merlin can rely solely on the tenancy agreement and take advantage of it even though the three agreements were so inter-related to one another. This is again a serious question to be tried.

Encik Ismail, Counsel for Faber Merlin contended that the plaintiffs' application for an interlocutory injunction should not be granted. He referred to para. 15(a) of the statement of claim, where it was stated that "the plaintiff's claim for ... (c) specific performance of the agreements as declared." In support of his contention he referred to s. 54(f) of the Specific Relief Act 1950, which states that "an injunction cannot be granted ... (f) to prevent the breach of contract the performance of which would not be specifically enforced." Mr. Xavier, however, argued that the plaintiff's claim was based on the sale and purchase agreement for sale of shares and the other two agreements. He said that these agreements were specifically enforceable. He submitted that whether the agreement was specifically enforceable or not was a serious question to be tried and relied on *Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte. Ltd.* [1984] 1 CLJ (Rep) 346. In my view s. 54(f) of the Specific Relief Act should be read together with s. 20. I agree with Mr. Xavier that whether the agreements are specifically enforceable or not is a serious question to be tried. In the *Si Rusa* case, Counsel for the appellant urged upon the Court to consider two points of law: (a) by virtue of s. 20(1)(g) of the Specific Relief Act 1950 the contract could not be specifically performed and (b) in view of s. 54(f) the contract could not be specifically enforced. Abdul Hamid CJ (Malaya), as he then was, in delivering the judgment of the Federal Court said:

> While we appreciate that these questions are crucial indeed they are the main grounds upon which the appellant's case rests, we do not, however, see the necessity at that stage for the learned Judge to decide on these difficult points of law.
>
> Suffice for the learned Judge to decide, and this he did, that there are serious questions that have arisen for trial ...

Since there are serious questions to be tried in the present case, the next question to consider is whether damages would provide an adequate remedy for the plaintiffs in the event of their succeeding at the trial. See *American Cyanamid v. Ethicon* [1975] AC 396 at p. 407 and 408. In my opinion Hotel Merlin would suffer irreparable damage which could not be compensated if the injunction prayed for was not granted. Mr. Xavier submitted: "The employees are ours, licences in our name i.e., in the name of Hotel Merlin. We are the only one to have the licence to run the hotel. We will lose a lot of business, **reputation** in the hotel industry, **goodwill** and will be contractually liable to third party". Paragraph 7 of Johari's affidavit in support of the plaintiffs' application also states:

> By reason of the unlawful manner in which the defendant took possession and removed the 2nd plaintiff, the 2nd plaintiff has suffered damage and continues to suffer **irreparable damage** not only to its **business and goodwill** but also place the 2nd plaintiff in jeopardy of being rendered liable for breach of contract by 3rd parties. This is more so the case as the 2nd plaintiff's main revenue is in the form of group bookings. This is more aggravating at this point in time with SEA Games to be held in August.

Faber Merlin recognised that Hotel Merlin had gained reputation as a first class five star hotel. In preamble A of the tenancy agreement it was stated that "The lessee has substantial expertise and a high reputation in the operation of first class international standard five star deluxe hotels." In my view goodwill and reputation cannot be compensated with money. If the injunction is refused Hotel Merlin will suffer irreparable damage. It is not in dispute that Hotel Merlin had the expertise to operate a first class five star hotel. On the other hand there is no evidence that Faber Merlin has the expertise to operate a first class hotel like Hotel Merlin. It is clear therefore that the balance of convenience lies in favour of granting the injunction.

I shall now deal with Faber Merlin's application. As already stated this application is for a mandatory injunction. Although the second part of prayer 1 is couched in prohibitory terms restraining the plaintiffs from entering or remaining on the hotel premises, prayer 1 must be read as a whole and the second part is in effect asking for a mandatory injunction. See *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] MLJ 150.

The application was supported by the affidavit of Raja Mohar bin Raja Zainal Abidin, Manager of Human Resources and Administration of Faber Merlin, affirmed on 19 June 1989. In para. 3 of the affidavit the deponent averred that the matter arose from the retaking of possession of Hotel Merlin by Faber Merlin who was the owner of the hotel. According to him, since the taking over of the possession of the hotel by Faber Merlin, the situation had become tense, serious and potentially explosive and it was necessary for Faber Merlin to make the application. In para. 5 the deponent averred that if an order as applied for in the application was not obtained the situation could well get out of hand resulting in damage to property and injury to people. In para. 6 the deponent averred that Faber Merlin gave the undertaking as to damages.

Raja Mohar's affidavit referred to the affidavit of Anwar Batcha affirmed on behalf of Faber Merlin on 19 June 1989. This affidavit sets out the sequence of events leading to the taking of possession of the hotel. In para. 6 of the affidavit, the deponent averred that Faber Merlin was entitled to take over possession of the hotel under the provisions of the tenancy agreement, which had been terminated by Faber Merlin as a result of the breach of the said agreement by Hotel Merlin. He added that the taking of possession of the hotel was in accordance with the law and Faber Merlin, in taking possession of the hotel, did not in any manner exceed the bounds prescribed by law. Faber Merlin denied that Hotel Merlin had

suffered any loss or damage. According to the deponent Hotel Merlin not being entitled to possession of the hotel could suffer no loss or damage recognisable in law. In para. 10 he averred that the plaintiffs unlawfully retook possession of the hotel.

It appears that the sole basis of Faber Merlin's application was that Hotel Merlin did not pay the arrears of rents due and owing to Faber Merlin. Faber Merlin then invoked Art. 8(e) of the tenancy agreement and terminated the lease after giving due notice to Hotel Merlin. Article 8(e) allowed Faber Merlin to take possession of the hotel after the lease was properly terminated.

Encik Ismail submitted that in considering the application the Court should examine only the tenancy agreement. He added that whatever breaches in respect of the other two agreements were not relevant to his application. In support of his submission he cited *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] CLJ (Rep) 231. In that case the Federal Court decided that whether or not an assignment was an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 was to be gathered only from the four corners of the instruments itself. In that case the only question to be decided by the Federal Court involved the interpretation of an assignment made on 18 February 1978 between the appellant, as assignor and the Public Bank, as assignee.

In my opinion the present case is different from *Nouvau Mont Dor* case. In the present case the three agreements were inter-related. Clause 4(b) of the sale and purchase agreement expressly provided:

> The purchaser further covenants and undertakes to cause the company to execute simultaneously with this agreement (i) a tenancy agreement whereby the vendor shall let and the company shall take the hotel building and equipment more fully described in the tenancy agreement and (ii) the agreement for the sale of assets and assumptions of liabilities.

The tenancy agreement would not be in existence if the sale and purchase agreement was not concluded between the parties concerned. Since all the three agreements were inter-related the Court, in considering the tenancy agreement has to take into consideration the plaintiffs' allegations that Faber Merlin had failed to comply with the terms of the other two agreements.

Encik Ismail argued that since the lease was terminated, Hotel Merlin was a trespasser on the premises. According to him the basis of a mandatory injunction flowed from the fact that the first plaintiff was a trespasser.

Our Courts have already dealt with the question of mandatory injunction. In *Sivaperuman's* case, the Federal Court held that a mandatory injunction would never be granted save in exceptional and extremely rare cases. In *Bank Islam Malaysia Bhd. v. Tinta Press Sdn. Bhd. & Ors.* [1986] 1 MLJ 259:

> From the evidence stated above, I find that the bank has an unusually strong and clear case against the first defendant. I am confident that at the trial of the suit, the Court will probably grant a mandatory injunction against the first defendant. If the injunction had not been granted earlier, the bank would probably suffer grave damage and greater hardship. The value of the equipment would reduce considerably and the bank would not be able to recover half of the money spent to purchase the equipment. I find that the balance of convenience is very much in favour of the bank.

The decision in *Bank Islam's* case was upheld by the Supreme Court in *Tinta Press Sdn. Bhd. v. Bank Islam Malaysia Bhd.* [1987] CLJ (Rep) 396.

In my view Faber Merlin had failed to show that this was an exceptional and extremely rare case for the Court to grant a mandatory injunction. It is true that Faber Merlin was entitled to take possession of the hotel under the tenancy agreement. But the Court has to consider Faber Merlin's obligations under the two other agreements as well. There were allegations that Faber Merlin had acted in breach of the other two agreements.

As already stated, there is no evidence that Faber Merlin has the expertise to run a five star hotel. On the other hand Hotel Merlin has acquired the reputation and goodwill to operate the hotel as a five star hotel of international standard. In the circumstances this was not an exceptional and extremely rare case for the Court to grant a mandatory injunction. Furthermore the balance of convenience was not in favour of granting the injunction.

For the reasons stated above, I granted the order dated 20 June 1989.

Also found at [1989] 2 CLJ 625